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No. 10-977

Supreme Court, U.S.
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In The

Supreme Court of the United States

CAPITAL ONE BANK (USA), N.A., PETITIONER,

v.

RAQUEL RUBIO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JAMES F. MCCABE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

NANCY R. THOMAS
MORRISON & FOERSTER LLP
555 West Fifth Street,
Suite 3500
Los Angeles, CA 90013

DEANNE E. MAYNARD
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
dmaynard@mofo.com

Counsel for Petitioner

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

A divided panel of the Ninth Circuit reached a result under the Truth in Lending Act (TILA) applying a legal standard contrary to that used by other courts of appeals interpreting the same statutory language. The Ninth Circuit held that a disclosure cannot be "clear" if a reasonable person could read the disclosure in more than one way. That very legal rule had previously been considered, yet not adopted, by the Federal Reserve Board when it addressed possible amendments to its definition of the term "clear."

Here, the Ninth Circuit subjected petitioner to TILA liability for a disclosure regarding "fixed" interest rates made in 2004. It did so even though the Federal Reserve Board expressly elected to regulate disclosures about "fixed" interest rates only *prospectively* (i.e., after February 22, 2010). In many ways, this case resembles *Chase Bank USA N.A. v. McCoy*, 562 U.S. ___, 131 S. Ct. 871 (2011), another TILA case in which the Ninth Circuit mistakenly read new regulations retroactively and threatened massive liability against the lending industry. Respondent attempts to distinguish *McCoy* based on the existence of an amicus brief by the Board that informed the Court that the prior regulation did not prohibit the conduct. Br. in Opp. 6, 36. But here too the Board has made clear that its pre-2010 regulations did not prohibit the disclosure made here. Indeed, it characterized its new, 2010 regulations as a "major change." Final Rule, 74 Fed. Reg. 5244, 5245 (Jan. 29, 2009).

This Court's review is thus warranted and the petition should be granted. At a minimum, if there is any doubt as to the meaning of the Board's regulation or the significance of the ruling below, this Court should invite the views of the Solicitor General of the United States.

A. Contrary To Respondent's Claim, The Courts Of Appeals Are Divided On A Recurring Issue Of Exceptional Importance

Respondent seeks to avoid review by obscuring the Ninth Circuit's holding. Respondent contends that the Ninth Circuit merely held that she stated a claim under TILA that the disclosure was not "clear and conspicuous," and that it did not hold that she had established a violation. Br. in Opp. i, 2. But the panel held that whether a disclosure was "clear" was a matter of law, not of fact, Pet. App. 9a, and then went on to hold that petitioner "cannot show that, as a matter of law, this disclosure is clear." Pet. App. 9a. In doing so, the panel majority expressly rejected the dissenting judge's view that the case should be remanded for a jury trial on the question whether the disclosure was "clear." Pet. App. 13a; Pet. App. 23a (Graber, J., dissenting).

Respondent also tries to avoid the conflict among the circuits regarding TILA's disclosure requirement by characterizing the holding in this case as confined to disclosures regarding the so-called "Schumer Box." Br. in Opp. 4, 9-10, 12-13. But the panel reversed because it held that petitioner did not comply with

TILA's requirement to "clearly" disclose certain information. Pet. App. 9a, 16a. That requirement appears over 30 times in TILA. The holding in this case is thus not limited to any particular disclosure requirement of TILA, but will apply to every disclosure mandated by TILA. As shown in the petition, the courts of appeals have adopted different standards for determining whether a disclosure is "clear."[1]

1. Respondent does not defend what the Ninth Circuit actually held in this case. The Ninth Circuit first reasoned that, in order to be "clearly" disclosed, a disclosure must be "reasonably understandable," wording drawn from the Federal Reserve Board's Official Staff Commentary. Pet. App. 8a (quoting 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 5a(a)(2).1). But in applying that standard, the Ninth Circuit held that a disclosure cannot be "reasonably understandable" if "reasonable consumers can interpret [it] * * * in more than one way." Pet. App. 13a.

Respondent attempts to diminish that holding by suggesting that the Ninth Circuit merely held that a disclosure that is "so ambiguous that it *would* cause a reasonable person to be misled" is not "reasonably

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[1] Respondent notes that all of the circuits have held that the inquiry is an objective one, and not based on the subjective understanding of any particular consumer. Br. in Opp. 4 n 2, 13, 22-23 That consensus does not address the question, which divides the circuits, about how to measure whether a disclosure is "clear" to that hypothetical consumer.

understandable." Br. in Opp. 20 (emphasis added); *see id.* at 23. But respondent's characterization cannot be squared with the critical language of the Ninth Circuit's decision. The panel held that so long as a reasonable person "*could* read [a disclosure] to mean something that is not accurate," then it was not reasonably understandable. Pet. App. 13a (emphasis added). That application of the Federal Reserve Board's "reasonably understandable" definition also has been accepted by the Third Circuit. Pet. 23-24. Yet that is an unnatural reading of the regulatory definition.

Indeed, the Board has declined to embrace that legal standard. In 2003, the Board proposed to amend the definition of "clear" in TILA's Official Staff Commentary to give examples of disclosures that were reasonably understandable. *See* Truth in Lending, 68 Fed. Reg. 68,793 (proposed Dec. 10, 2003). In response, consumer representatives complained that "the Board's proposed interpretation of 'clear' [was] not sufficient" because it did "not set high enough standards." 69 Fed. Reg. 35,541, 35,542 (June 25, 2004). In particular, consumer representatives asked the Board to provide in its Commentary that "a disclosure is not clear if it is 'capable of more than one plausible interpretation.'" *Ibid.* The Board declined to do so. Instead, consistent with other commenters' suggestions, the Board withdrew the proposed rulemaking and announced it intended "to focus on individual disclosures and to consider ways

to make specific improvements to the effectiveness of each disclosure." *Id.* at 35,543.

2. As the petition shows (Pet. 19-22), a number of circuits have accepted the Board's "reasonably understandable form" definition of "clear," but have applied a more lenient standard than the Ninth Circuit.

Respondent first attempts to limit each case to its facts. Br. in Opp. 21-28. But it is evident that those decisions find a disclosure to be "clear" even though a reasonable consumer could "interpret it in more than one way." Such a disclosure would not be clear under the holdings of the Third and Ninth Circuits. Pet. App. 13a; Pet. 23-24.

For example, respondent claims that in *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 581 (11th Cir. 1996), cert. denied, 520 U.S. 1198 (1997), the Eleventh Circuit "simply arrived at different conclusions" than the Third Circuit had in *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066 (1992), even though they "applied the same standard" to the same disclosure. Br. in Opp. 24 n.8. But the standard was the critical difference in those cases. In both *Veale* and *Porter*, the lender issued a notice to the borrowers that provided: "You have a legal right under federal law to cancel this transaction. . . . If you cancel the transaction, the (mortgage/lien/security interest) is also canceled." 85 F.3d at 580 (emphasis omitted); *see* 961 F.2d at 1076-1077. But, in fact, the borrowers "did not have the right to rescind the entire security

interest." 85 F.3d at 580. That was because the borrowers "already owed [the lender] money and [the lender] already had a mortgage on their home. Thus, [the lender] would still hold a mortgage on the home even if the [borrowers] elected to rescind the current transaction." *Ibid.* The Third Circuit in *Porter* held that the notice was subject to two "sensible" readings and "[b]ecause both readings are plausible, we conclude that the [notice] did not provide [the borrower] with a clear notice of what her right to rescind entailed." 961 F.2d at 1077. The Eleventh Circuit "respectfully disagree[d]" with the Third Circuit and held that the same notice was "reasonably clear" and "provide[d] sufficient notice" for purposes of TILA. 85 F.3d at 581.

Respondent also asserts that the decisions cited in the petition from the Second and Sixth Circuits are not relevant to whether there is a circuit conflict because they were decided before TILA was amended in 1980 and before the Schumer Box requirements were enacted in 1988. Br. in Opp. 24-25 n.9, 26 n.10. But the "clear and conspicuous" requirement has been in TILA since 1968. *See* Pub. L. No. 90-321, § 121, 82 Stat. 146, 152 (1968). The Federal Reserve Board's "reasonably understandable" interpretation was published in the Official Staff Commentary in 1981. Pet. 22. Thus, all the decisions cited in the petition deal with precisely the same statutory language and administrative guidance that the Ninth Circuit misinterpreted here.

3. Finally, respondent contends that the Seventh Circuit has not rejected understandability as a component of "clear and conspicuous." Except for the one outlier decision noted in the petition (Pet. 19 n.6), respondent is mistaken.

a. Contrary to respondent's claim (Br. in Opp. 14-16), *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407 (7th Cir. 1980), did not hold that a disclosure is not "clear and conspicuous" if it "may create confusion." The plaintiffs in *Smith* had three separate TILA claims. Only one claim related to the "clarity of the disclosures made." *Id.* at 415. The plaintiffs asserted that the amount of finance charge "while disclosed, is so obscured behind printed words and lines in the form as to be illegible." *Ibid.* The court of appeals held that the disclosure was "unreadable" and thus violated the creditors' obligation that "disclosures be made 'clearly.'" *Id.* at 418 & n.29. The court of appeals found a violation without any mention of the separate requirement that the disclosure be made conspicuously. Thus, the court of appeals in *Smith* equated clarity with legibility.

The language from *Smith* quoted by respondent addressed the plaintiffs' other TILA claims. The plaintiffs also had claimed that the creditor violated a TILA requirement that disclosures be made "in the terminology prescribed" by TILA, and that the creditor not describe numbers as "estimated" in most circumstances. On those claims, the Seventh Circuit explained that standardized terminology was intended to prevent confusion and promote comparison

shopping, and found that the creditor violated those other provisions by using terminology different from that allowed by the regulations. *Id.* at 416-418. Respondent in this case pressed no such TILA claims, claiming only that petitioner's disclosure was not "clear."

b. Respondent cannot and does not dispute that the Seventh Circuit held in *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (1996), that the term "clear and conspicuous" "refers to the mode of presentation, not the degree of comprehension." *Id.* at 382. Instead, respondent asserts that that decision can be ignored because it was interpreting the Consumer Leasing Act (CLA). But the CLA was enacted by Congress in 1976 as an amendment to TILA, *see* Pub. L. No. 94-240, § 3, 90 Stat. 257, 257 (1976), and uses the same language.

Respondent also asserts that there was no regulation under the CLA providing a definition similar to that contained in the Board's Official Staff Commentary to its TILA regulations. But in fact, the Board has adopted the same definition for the CLA. The Board in its Official Staff Commentary to its CLA regulations defines the term "clear and conspicuous" to mean that the disclosure be "reasonably understandable." 12 C.F.R. Pt. 213, Supp. I, Official Staff Interpretations, cmts. 3(a)-2 and 7(b)-1. This has been the Board's interpretation of "clear and conspicuous" in the CLA since at least 1982. *See* 47 Fed. Reg. 20,553, 20,557 (Official Staff Interpretation May 13, 1982).

c. Respondent also errs in asserting that the Seventh Circuit's discussion in *Smith v. Check-N-Go of Illinois, Inc.*, 200 F.3d 511 (1999), addressed only conspicuousness, and not "clear." Br. in Opp. 17 & n.6. In that case, the Seventh Circuit addressed a claim that one term was not "more conspicuous" than another, as required by TILA. In so doing, the Seventh Circuit explicated the relationship between "clear" and "conspicuous," while reaffirming that neither goes to understandability of content. Judge Easterbrook (who previously had authored *Channell*) explained that "whether particular disclosures are 'clear' is an issue of fact, for the extent to which one piece of paper obscures another varies, and clarity depends on what a particular borrower would observe." *Smith*, 200 F.3d at 514. Whether one disclosure is more conspicuous than another, by contrast, is a legal matter because it "depends on the contents of the form," and not on what the borrower saw. *Id.* at 515. This expressly conflicts with the Ninth Circuit's view that clarity is a question of law, Pet. App. 9a, which focuses on the contents of the form.

d. As noted in the petition, there is a subsequent Seventh Circuit decision that treats the word "clear" as requiring some level of understandability. Pet. 19 n.6 (citing *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803 (7th Cir. 2001)). But, as respondent acknowledges (Br. in Opp. 18), the Seventh Circuit has never cited *Lifanda* for that particular point of law. And that case did not grapple with the Circuit's earlier decisions, which gave the term

"clear" a meaning that did not require courts to decide what reasonable consumers would find understandable.

B. The Ninth Circuit's Decision Expressly Relied On The New Federal Reserve Board Regulations And Effectively Made Them Retroactive, Despite The Contrary Determination Of The Board

Respondent does not dispute that the Federal Reserve Board promulgated a new regulation, effective February 22, 2010, that expressly deals with when it is appropriate to use the word "fixed" in describing an interest rate. Pet. 24. Nor does she contest that that regulation does not govern this case, in which the disclosure was made in 2004. That is because the Board expressly elected not to make the regulation retroactive, and instead gave credit card companies months after the regulation's promulgation to bring their disclosures into compliance with the new rule, which the Board found was a "major change," 74 Fed. Reg. at 5245. *See* Pet. 24-25.

Offering a block quote from the decision below, respondent asserts that the Ninth Circuit made "clear that it had not relied on the recent amendment to TILA's regulations." Br. in Opp. 35. But respondent uses ellipses to omit crucial sentences from the Ninth Circuit's opinion. Br. in Opp. 34-35. Contrary to respondent's claim, the panel majority *expressly* relied on the 2009 amendments in reaching its conclusions about how to read the "clear" requirement.

> *The new regulation* and the empirical studies it relies on *are therefore relevant and informative for this case.* For even where not binding, *an agency's interpretation of a statute certainly may influence courts* facing questions the agency has already answered.

Pet. App. 12a (emphases added; quotation marks and brackets omitted). The panel thus found the new regulation "relevant" and "influen[tial]," yet disregarded the Board's determination to give it only prospective effect. That is precisely the type of error this Court found that the Ninth Circuit made in *McCoy*, mistakenly relying on the Board's current regulation in determining "what the pre-2009 version of Regulation Z required." *McCoy*, 131 S. Ct. at 881.

Respondent also asserts (Br. in Opp. 5-6, 7, 31-33, 35, 36, 37) that such retroactive application does not harm petitioner because it should have been on notice, from the Third Circuit's decision in *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260 (2003), that the use of the word "fixed" in a Schumer Box violated TILA. But in *Roberts*, the word "fixed" was not in the Schumer Box, it was in a separate introductory letter. The court of appeals expressly cautioned that the lack of clarity "is not that Roberts could have concluded that the rate was permanent solely based on the use of the word 'fixed.' Rather, the concern is that [the lender] may have misled potential consumers by indicating that the rate could only change in the instances it specified in the solicitation materials." *Id.* at 268 n.3. Here, the solicitation materials

expressly provided that petitioner could change the interest rate. Pet. App. 66a. Thus *Roberts* provided no notice of the liability created by the Ninth Circuit here.

C. The Ninth Circuit's Decision Is Wrong And Will Result In Broad Negative Consequences

The panel majority held that petitioner had violated TILA because using the word "fixed" to describe the interest rate did not make it "clear" that the consumer was not entitled to that interest rate for the rest of her life. Pet. App. 12a. That holding cannot withstand scrutiny. Nothing in the solicitation entitled respondent to a credit card for life, much less the same interest rate for life. Indeed, on the very same page, the solicitation stated that the "Agreement terms (for example, rates and fees) are subject to change." Pet. App. 66a. And after respondent received a fixed interest rate for over three years, petitioner offered her a choice to either accept a new rate or to stop incurring new debt and pay off her old debt at the previous rate. Pet. 11-12, 32-33. No one could reasonably understand the solicitation to have entitled her to anything more.

Unless reviewed and reversed, however, the Ninth Circuit's decision will have enormous adverse effect on the lending industry. As the Federal Reserve Board found (and respondent does not dispute), the use of the word "fixed" in credit card solicitations was common before the Board prospectively imposed limits on the use of the word. Pet. 30-31. Respondent

herself acknowledges that these violations could result in "significant liability" and "substantial damages." Br. in Opp. 7. Indeed this lawsuit and others, involving more than a hundred thousand consumers, are currently pending. Pet. 33.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted. At a minimum, this Court should invite the views of the Solicitor General as to whether review should be granted.

Respectfully submitted,

JAMES F. MCCABE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

NANCY R. THOMAS
MORRISON & FOERSTER LLP
555 West Fifth Street,
Suite 3500
Los Angeles, CA 90013

DEANNE E. MAYNARD
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
dmaynard@mofo.com

Counsel for Petitioner

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